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Supreme Court of the United States

October Term, 1957.

No. 259.

THE WESTERN UNION TELEGRAPH COMPANY, *Petitioner,*

v.

MARY RUTH SPARKS, - - - - *Respondent.*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States.

The petition for Certiorari in this action should be denied because the District Court and the United States Court of Appeals for the Sixth Circuit have applied the law of the State of Kentucky correctly, and the decision is not in conflict with the applicable law of the State of Kentucky. Therefore, clearly under Rule 19(b), Supreme Court Rules, the Petition for Writ of Certiorari should be denied.

I. COUNTER-STATEMENT OF THE CASE.

Since a complete statement of the facts of the case was not given, it will be necessary to restate the facts.

On March 8, 1954, Mrs. Sparks left her home for the purpose of going to work at Bacon's Department Store. Mrs. Sparks is 46 years of age (R. 25a). After transferring from one bus to another she got on a bus in which she rode north on Fourth Street to Market Street, where she got off the bus on the northeast side of the intersection of Fourth and Market Streets (R. 27a). Mrs. Sparks then started towards her employment, which is located on the south side of Market Street and proceeded to cross Market Street in the east crosswalk (R. 27a). The crosswalk is plainly marked with white lines and is a very busy intersection (R. 27a). Mrs. Sparks had walked upon this crosswalk before on her way to work, but she had not been across this intersection for better than two months (R. 47a) prior to the accident. She had not previously observed any obstruction or danger in the crosswalk (R. 27a). She was walking with the green traffic light (R. 28a), which was in her favor as well as with automobile traffic moving across the intersection (R. 28a). There were automobiles moving north and south on Fourth Street, and it is permissible for north bound automobiles on Fourth Street to turn right into Market Street, which would require them to go across the crosswalk in which she was walking. There were automobiles on all four corners of the intersection, and Mrs. Sparks, as she proceeded to walk

southwardly on the east side of Market Street in the crosswalk, was watching and observing the traffic that was ready to start across, approaching, through or around the intersection (R. 28a). While so proceeding, her left heel became caught in one of the holes in a manhole cover belonging to the defendant (R. 29a). The holes go all the way through the cover. She did not see the hole prior to the time that her foot caught in it (R. 29a). Her shoes were introduced into evidence (Plaintiff's Exhibit 1, R. 25a). These shoes contained a metal plate the purpose of which is to keep the heels from breaking off (R. 29a). The shoes that she wore were exhibited to the jury, and they are of the ordinary and usual type for a lady to wear on the street. The heel is approximately three inches in height, and the bottom of the heel is approximately seven-eights of an inch across (R. 14a). The result was that she was caused to fall and her right knee cap was broken (R. 30a).

Upon cross-examination, Mrs. Sparks testified that her eyesight was good (R. 47a), but she testified that she was not looking directly for the manhole cover, and that the holes in it were not visible to her (R. 47a-48a). She stated that she had observed previously manhole covers which had holes in them (R. 50a). Plaintiff does not know exactly which hole in the manhole cover her foot caught in, but she does know that her foot caught in a hole in this particular cover (R. 52a, 53a). Although she had crossed the street previously, she does not remember seeing this manhole cover previously (R. 52a).

The intersection is shown in Plaintiffs' Exhibit 3, (R. 25a), and the particular manhole is shown in Plaintiff's Exhibit 2 (R. 25a). As to the particular manhole cover involved, there are four holes around the center (R. 14a, 52a). The hole involved is one and one-sixteenth inches across in diameter (R. 127a). It is to be further noted from the Exhibit 3 (R. 25a) and the testimony that the manhole cover involved is directly in the crosswalk (Defendant's Trial Map, Exhibit 1, R. 51a) at a busy intersection (R. 53a). It is to be further noted from Plaintiff's Exhibit 3 (R. 25a) and the defendant's own testimony (R. 131a) that in this intersection there is also one manhole cover that does not have any hole in it which belongs to the Sewer Commission (R. 139a).

There is a strict conflict in the evidence concerning the proper method of maintaining manhole covers, especially when they are located in busy intersections. There is no common practice in Louisville concerning whether covers for manholes should have holes or not (R. 79a), for some companies do and some companies do not. The modern trend is for manhole covers to have no holes in them, or one hole or holes with a removable rivet (R. 65a). It was established that the Louisville Gas & Electric Company has over one thousand manhole covers (R. 67a) in the City of Louisville while Western Union has about 150 (R. 197a). Louisville Gas & Electric Company maintains approximately one-fifth of the manholes in the City of Louisville (R. 16a-17a; 107a, 119a). For a period of better than ten to fifteen years the Louisville Gas & Electric

Company has followed the practice of plugging up the holes in the manhole covers with a flattop rivet (R. 68a-179a). These rivets may be withdrawn easily by the employees for the purpose of placing an iron metal bar under the cap in order to lift it (R. 67a). These rivets are placed in the holes and are squared off so that there is no chance for anyone stumbling upon it. Louisville Gas & Electric Company officials were asked and did go onto the street and report on the rivets being in the covers when located in intersections or places where people walk and reported the presence of the rivets in the holes (R. 181a-182a; 73a, 75a-79a).

In the defendant's proof it was also admitted by Mr. W. F. Markley, its Assistant Lines Engineer, that the Western Union Telegraph Company does not use in all locations manhole covers with vents in them; however, their prime consideration for using such a manhole cover had nothing to do with the safety of pedestrians, but whether the location of the manhole was such as to cause considerable wash into the manhole from heavy rain bringing in water, mud, and dirt (R. 198a). However, clearly both types of covers are in use, and the vent holes are optional according to Western Union's own expert (R. 193a).

The present manhole here involved was first built in 1909 (R. 199a). and contained ten holes approximately one-inch in diameter. In 1914 (R. 199a) the manhole was changed and it provided twelve holes approximately one-inch in diameter. In 1920 (R. 199a-200a) the manhole cover was again changed and

had only one hole. In 1927 it was again changed to where it has four holes (R. 200a).

While there was testimony on behalf of the defendant concerning the various types of manhole cover in the City of Louisville by alleged expert witnesses, it is to be noted that these witnesses did not hold up on cross-examination. Mr. H. T. Meiners affirmed that the Louisville Gas & Electric Company and the Southern Bell Telephone Company have the greatest number of manhole covers in the City of Louisville (R. 119a). He admitted that he made no complaint for safety reasons to the Louisville Gas & Electric Company, because it had stopped up the holes in its manohle covers with rivets (R. 124a).

Mr. W. M. Goforth, City Foreman for Western Union, testified that at Fourth and Market there was one manhole that had no holes in it, and this cover was over a sewer (R. 131a). (See Reed, R. 139a.) Mr. Verne Quinn, of the Southern Bell Telephone Company, testified, concerning the Southern Bell Telephone Company's manhole cover, that within the last five years the Southern Bell Telephone Company has not installed in any crosswalk a manhole cover containing holes (R. 154a-155a).

Mr. William Marshall Bullitt made an independent investigation and testified that he had received the report from one of his associate lawyers in preparation of the case that in the principal parts of Louisville the covers on the manholes did not have holes in them (R. 160a), but that he went out to disprove the matter. Mr. F. W. Russell, Vice President in Charge of Opera-

tions at Louisville Gas & Electric Company, was called on behalf of the defendant and testified (R. 178a-179a) without contradiction upon cross-examination that for about fifteen years it has been the accepted practice of the Louisville Gas & Electric Company to drop rivets in the one hole that is in the Louisville Gas & Electric Company's cap for purposes of removal in order to protect from the hazardous condition created by the hole, especially in the crosswalks in Louisville. Such instructions are given to the underground department and have been in effect for some fifteen years (R. 179a). Mr. W. F. Markley, Western Union's expert, further testified that in particular situations where it is necessary to have solid caps over the manholes that other manhole where there are vents will take care of the one that does not have vents as far as circulation of air is concerned (R. 198a).

It is uncontradicted that there is an Ordinance in the City of Louisville that requires underground wires in the business district (R. 85a).

There is a conflict of evidence as to the necessity for having holes in the manhole covers for purposes of circulation to prevent explosions. Even though a manhole has holes in the cover, it will still have gas in it (R. 181a, 206a). It is clearly established that the sewer gas or gases caused from natural causes in the ground are heavier than air and will remain in the sewer regardless of the number of vents in the manhole cover (R. 180a). If there is any leakage from the gas lines of the Louisville Gas & Electric Company that is lighter than air, it will come to the top (R. 180a).

However, there is a conflict of evidence on the point as the plaintiff introduced evidence to the effect that the caps do not fit tightly and that this gas may go out around (R. 166a) the edges of the cap (R. 181a). Or, in the case of the Louisville Gas & Electric Company where rivets have been placed in the holes, the gas will go around the outside of the rivets, as the rivets are not placed tightly. It was established upon cross-examination of Mr. H. T. Meiners that he made no complaint as to the method used by the Louisville Gas & Electric Company in preventing the hazard to pedestrians as being unsafe and causing explosions (R. 124a).

As the result of the accident, Mrs. Sparks' right knee cap was broken (R. 30a) and her back was twisted. As to hospital, medical, surgical, transportation and help for herself, Mrs. Sparks proved bills in the amount of $2,323.65, and loss of wages from March 8, 1954, to September 12, 1954, in the sum of $1,343.00.

The Trial Court submitted the case to the jury after overruling the defendant's motion for a directed verdict. The jury returned a verdict in the amount of $18,000.00—$2,300.00, hospital and doctor bills; $1,300.00, loss of time; $14,400.00, damages (R. 10a). Western Union made a motion for judgment notwithstanding the verdict and for a new trial (R. 10a-12a), which the District Court overruled (R. 19a) on the basis of an opinion concerning his views of this case (R. 14a-19a; *Sparks* v. *Western Union Telegraph Company,* 141 F. Supp. 328). The case was then appealed to the United States Court of Appeals for the

Sixth Circuit which affirmed the judgment of the District Court (Appendix to Petition, page 15), adopting the Opinion of Judge Henry Brooks of the Western District of Kentucky as its own.

II. QUESTIONS PRESENTED.

1. Did the District Court correctly refuse to direct a verdict for Western Union Telegraph Company under the "Common Use Doctrine" because there was a conflict of evidence where the plaintiff's proof showed that other public utility companies in the City of Louisville, Kentucky, capped their manholes when located in crosswalks in such a way that there were no holes present which would catch the heel of a woman walking over it, and Western Union Telegraph Company did not follow this practice but placed manhole covers in crosswalks with holes in them that acted as traps to pedestrians, especially women wearing shoes with small heels?

2. Should the District Court have directed a verdict for Western Union Telegraph Company upon the ground that Mrs. Sparks' injury was caused by her own contributory negligence when she was crossing for the first time in two months a busy intersection in the crosswalk while watching for vehicular traffic that may turn in her path and inadvertently steps upon a manhole capped by a cover containing holes which caught her heel?

III. REASONS FOR DISALLOWANCE OF THE WRIT—ARGUMENT.

FIRST—INTRODUCTION.

The Court of Appeals for the Sixth Circuit decided this case correctly on the applicable Kentucky law as it was required to do under the authority of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, since jurisdiction of this case was based on diversity of citizenship.

SECOND.

A. Did the District Court correctly refuse to direct a verdict for Western Union Telegraph Company under the "Common Use Doctrine" because there was a conflict of evidence where the plaintiff's proof showed that other public utility companies in the City of Louisville, Kentucky, capped their manholes when located in crosswalks in such a way that there were no holes present which would catch the heel of a woman walking over it, and Western Union Telegraph Company did not follow this practice but placed manhole covers in crosswalks with holes in them that acted as traps to pedestrians, especially women wearing shoes with small heels?

Under the Kentucky law as analyzed by a Kentucky Judge (141 F. Supp. 328) a jury issue was presented as to whether or not Western Union was negligent in not meeting its continuous duty to properly maintain the manhole covers in a reasonably safe condition for pedestrians using the crosswalk in 1954.

The Petition contends in this case that the Circuit Court of Appeals and the District Court did not correctly apply the Kentucky law. It has been said by various Circuit Court of Appeals in reviewing diversity of citizenship cases which are determined on local state law that they should defer to the opinion of the Trial Judge who has been a lawyer of long standing in the State. This is particularly true of Judge Henry Brooks of the United States District Court for the Western District of Kentucky who tried this case. Judge Brooks has been a practicing Kentucky lawyer ever since he was admitted to the Bar with the exception of the military service. He has been a Circuit Judge in Kentucky and the trying of cases under Kentucky law is not a new matter to him. *Standard Brands, Inc.* v. *Bateman,* 184 F. 2d 1002, 1011 (C. A. 8th); *Nolley* v. *Chicago, M., St. P. & P. R. Company,* 183 F. 2d 566, 572 (C. A. 8th); *Fargo National Bank* v. *Agricultural Insurance Company,* 184 F. 2d 676, 683 (C. A. 8th); *Hope Flooring & Lumber Company* v. *Boulden,* 227 F. 2d 303, 305 (C. A. 8th). However, after reading the Trial Court's Opinion in this matter, it is respectfully submitted that there is no doubt that the Kentucky law and the evidence justified the submission of the case to the jury. Most of the cases cited in this Petition are distinguished in that Opinion by the very language of the decisions themselves. Admittedly, there was a conflict of evidence but this simply makes a jury issue.

It is the duty of the utility when it constructs a manhole for its own use and benefit, even though it has

a license from the City, to build it in a reasonably safe manner and to maintain it in a reasonably safe condition. It is under a continuous duty to exercise care to keep and maintain the manhole cover in such condition so that the road would be in reasonably safe condition considering the uses and travel to which it might be reasonably anticipated it would be subjected to in the future, and to take notice of future travel and exercise such care as might be necessary to maintain the cover in a reasonable safe condition to meet these requirements. *McWilliams* v. *Kentucky Heating Company,* 166 Ky. 26, 179 S. W. 24, 27; *City of Lebanon* v. *Graves,* 178 Ky. 749, 199 S. W. 1064; *Jefferson Dry Goods Company* v. *Dale,* 257 Ky. 501, 78 S. W. 2d 305, 307; *Mullins* v. *United Carbon Company,* 282 Ky. 111, 137 S. W. 2d 1089, 1090. The duty is a continuing one, and the Kentucky Rule is that even conceding this utility applicance when first constructed was placed in such a condition that it was safe, the care demanded of the utility did not end with the original construction. The Kentucky Court of Appeals stated the rule in *McWilliams* v. *Kentucky Heating Company, supra,* page 27, as follows:

> "The duty imposed upon appellees to exercise ordinary care in the maintenance of these gas mains imposed upon them the duty of exercising ordinary care at all times while the mains were in the public road, to guard against injury through any reasonable and proper use of the road, in view of the conditions to which its use under modern methods might be subjected."

See *Trustees of the Village of Canandaigua* v. *Foster*, 156 N. Y. 354, 50 N. E. 971, 972; *Louisville Home Telephone Company* v. *Gasper*, 123 Ky. 128, 93 S. W. 1057; 25 *Am. Jur.*, "Highways," Section 504, "Appliances and Structure of Public Utilities," page 785.

Thus, under the doctrine of *McWilliams* v. *Kentucky Heating Company, supra,* where it was shown that a particular type of steam roller utilizing spikes on its rear wheels had been in use for approximately twelve years, that such type was neither new nor novel, and the gas company could have anticipated this accident resulting from the spikes breaking a gas line located too close to the surface. In the present case the evidence is uncontradicted that the Louisville Gas & Electric also anticipated the injury involved in this case and sought to minimize the hazard by placing rivets in the manhole covers, especially when located in crosswalks in intersections where people walk. Thus, the injury here having been anticipated by others for a long time, there is nothing new or novel in this situation. Compare *Stern* v. *International Railway Company,* 220 N. Y. 284, 115 N. E. 759, 761.

The general rule of law in Kentucky as to whether a hole in a street, sidewalk or crosswalk is of sufficient size or condition to constitute negligence is a question for the jury. *City of Louisville* v. *Haugh,* 157 Ky. 643, 163 S. W. 1101, 1102; *City of Cynthiana* v. *Scrsion,* 261 Ky. 667, 88 S. W. 2d 682; *City of Bowling Green* v. *Ford,* 263 Ky. 523, 92 S. W. 2d 744; *City of Louisville* v. *Verst,* 308 Ky. 46, 213 S. W. 2d 517; *City*

of Covington v. *Exterkamp*, 158 Ky. 599, 165 S. W. 967. Especially is this true when the hole is considered in the nature of a trap, and the question is whether a street or a sidewalk is reasonably safe for use of pedestrians a jury question is presented. *City of Covington* v. *Exterkamp, supra; City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386, 387. *City of Louisville* v. *Verst; supra,* at page 520, clearly establishes that the question of whether the defect constitutes actionable negligence is a question for the jury, and rejects the Michigan rule that a slight defect is not actionable. The rule in Kentucky is also clearly set forth in *City of Louisville* v. *Haugh,* 157 Ky. 643, 163 S. W. 1101, 1102, as follows:

> "The distinction between a hole in the street which would render a street unsafe and a hole that would not do so is a thing practically impossible to define. The depth of the hole alone would not control such characterization. Its shape, its size, its location with reference to the street lighting, its location with reference to the conditions and extent of public travel, and many other considerations would enter into the determination of the question of the effect of such hole upon the safety of the street, and would make the inquiry as to whether such hole amounted to a want of ordinary care upon the part of the city peculiarly a question for the jury."

The above rule has been applied to defects in the street where there have been holes in gratings or other instrumentalities. *Upham* v. *City of Boston,* 187 Mass.

220, 72 N. E. 946 (glass disk out in Hyatt light); *Mooney* v. *Hauck*, 1 Ohio App. 435, 35 Ohio C. C. 134, 18 Ohio C. C. N. S. 116, affirmed 112 N. E. 1084 (62 A. L. R. 1086) (glass missing in grating); *Niehaus* v. *Caryfield*, 269 N. Y. S. 335, 340 (glass missing in grating); *Monsch* v. *Pellissier*, 187 Cal. 790, 204 P. 224, 225; *Sanders* v. *First National Bank*, 183 Okl. 112, 80 P. 2d 207, 209 (glass prism missing in grating); *Holbrook* v. *City of Monroe*, 157 So. 566 (La.) (small water pipe—heel of woman caught in the hole); *Bosler Hotel Company* v. *Speed*, 167 Ky. 800, 181 S. W. 645, 647. In *Holbrook* v. *City of Monroe*, 157 So. 566 (La.), a lady caught her heel in a cut-off pipe which was located in the sidewalk. The Louisiana Court in viewing the situation presented by the facts, with particular emphasis on the nature of the construction of women's heels, stated that it is common knowledge that the average heel of a woman's shoe is small enough to enter a pipe such as this with a diameter of two and one-half inches. To leave such a pipe open on a much-used sidewalk in a city is clearly a defect in the sidewalk and is not a trivial defect, but is more in the order of a trap which is calculated to cause injury, at least to feminine pedestrians, who wear smaller shoes with smaller heels on them than men. The Court went on to say that it cannot be said that the plaintiff was not using ordinary care when she stepped with her heel into this hole when it was practically flush with the surface of the sidewalk. The Court stated "to so hold would be equivalent to finding that a pedestrian is required to keep his eyes glued to the sidewalk and

to look where he was stepping before each step, which is not the law in this State or any other State of the Union." Thus, from the very fact that the hole is small the Louisiana Court felt that the hole was more in the nature of a trap and less likely to have been seen than if it had been larger.

As shown from the District Court's Opinion and the proof of Western Union itself, this cover is not identical with all that Western Union has, for it has covers without holes in them. In addition, it is not the same safe method used by other utilities in Louisville to guard against the very thing that occurred here. The question is not what is the standard of care in New York or Cincinnati, but what is the standard of care in Louisville, Kentucky, concerning the hazard here involved.

In defense, Western Union relies upon the "common use" doctrine. The argument here made is completely disposed of in accordance with the Kentucky law in the Opinion of the trial judge, Judge Brooks, in his Opinion in this case reported in 141 F. Supp. 328. The rule as to "common use" as a defense is the same in Kentucky as set forth by Justice Holmes in *Texas & P. R. Company* v. *Beyhmer,* 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." In the recent case of *C. D. Herme Inc.* v. *R. C. Tway Company,* 294 S. W. 2d 534, 537 (Ky., 1956), the Court

of Appeals of Kentucky has stated as to negligence of manufacturers the test is not what other manufacturers are doing, or what is customary in the trade or industry, quoting *Prosser, Torts*, First Edition, Section 37, as follows:

> "Even an entire industry, by adopting careless methods to save time and effort or money, cannot be permitted to set its own uncontrolled standard. And if the only test is to be what has been done before, no industry will have any great incentive to make progress in the direction of safety."

Thus, the question becomes one that should be submitted to the jury in the light of all the circumstances.

In *Barnes* v. *F. C. Gorrell & Sons,* 296 Ky. 583, 177 S. W. 2d 395, the Kentucky rule as to the question of the practice of others as a defense is set forth in a clear and simple fashion. As laid down in *Barnes* v. *F. C. Gorrell & Sons, supra,* the rule is that while proof of the defendant's conforming to the practice of others in performing the same act is admissible in evidence, it is not conclusive of the question of negligence, and the matter must ordinarily be submitted to the jury. However, where the defendant by uncontradicted evidence has affirmatively established that the act complained of was performed in accordance with the usual and customary manner of persons engaged in a like business, it devolves upon the plaintiff to produce evidence that conforming to such practice or custom constitutes negligence. In *Barnes* v. *F. C. Gorrell &*

Sons, supra, this rule was applied because no evidence was introduced to show that there was any different manner of performing the work complained of.

The same is true in the case tried by this firm in *Ellis* v. *Louisville & Nashville Railroad Company*, 251 S. W. 2d 577 (Ky.). In that case no evidence was introduced to the contrary as to the method of performing the work involved in that particular case. Thus, on the uncontradicted evidence in both the Ellis case and the Barnes case compliance with the usual and customary method doing business was shown. However, this rule does not apply here (R. 17a—trial Court's Opinion), because it was specifically shown in the plaintiff's proof that the Louisville Gas & Electric Company, one of the largest owners and maintainers of manholes and manhole covers in the city of Louisville, had adopted another practice to avoid the very hazard here presented. That practice was to place rivets in the holes so there would be no hole for a woman's heel to go through while walking over the manhole cover (R. 65a). Utilizing the plaintiff's own witnesses upon cross-examination (R. 79a), it was clearly shown that the purpose of so applying these rivets by the Louisville Gas & Electric Company was to protect from the hazardous condition resulting from the holes being in the manholes, especially when located in the crosswalks. This was not a new practice, but had been going on for approximately fifteen years (R. 179a). Thus, from the evidence it was clearly shown that in the city of Louisville, Kentucky, an ordinary prudent operator of a utility having manhole

covers has for a long period of time, forseeing the possibility of the injury that occurred here, placed rivets in its manhole covers to minimize such a hazard. Plaintiff's Exhibit 3 (R. 251) shows that in crosswalks the Sewer Commission has done the same thing, for it has a solid manhole cover present. The Southern Bell Telephone Company has not placed any manhole covers with holes in them in crosswalks for the last five years (R. 155a). Thus, it is perfectly apparent that there is a conflict of evidence, which would call for the trial Court's submitting the case to the jury as the minds of reasonable men might differ as to what the ordinary prudent man would do to protect pedestrians in crosswalks from the hazards of holes in the manhole covers that would act as traps to catch the heels of women.

Greater Louisville First Federal Savings & Loan Association v. *Stone*, 242 S. W. 2d 739 (Ky.), is not applicable to the present case. The plaintiff relies upon this case as the basis for its so-called "common use" doctrine. However, the rule there set forth simply doesn't apply, because the evidence in the case shows that in the city of Louisville in crosswalks there is no "'common use" such as the Petitioner contends there is. Thus, the present case is clearly distinguishable on the facts (R. 17a—trial Court's Opinion). In that case a small child was burned due to the fact that there were uncovered radiator pipes around the banking building of the Greater Louisville Frst Federal Savings & Loan Association. The Court stated that it was a matter of common knowledge that uninsulated

radiator pipes existed everywhere. The Court stated, with reference to radiators and hot stoves, the practice of utilizing them was so usual and widespread that no property owner would be held liable to anticipate that an injury would occur by reason of the existence of the common-place condition. There was no evidence introduced showing a better method of doing the job by covering the pipes. But here the evidence clearly shows that the largest owner of manhole covers did not have any holes in the covers when they were located in crosswalks. In addition, the Exhibit 3 also shows the Sewer Commission (R. 139a) did not have any holes in the cover it had in this crosswalk. In addition, the plaintiff's own evidence showed that it, when it thought it reasonable, placed solid covers over its manholes (R. 198a).

The basis for the rule announced in the *Greater Louisville First Federal Savings & Loan Association* v. *Stone*, case, *supra*, is that it grew out of fact situations involving injury and damage resulting from a plaintiff's contact with an instrumentality in common use, and, in addition, to its being in common use, the instrumentality being found possessed of a visible, open, and notorious capacity for meting out injury and hurt.

In Kentucky the obviousness of the inherent danger of the particular instrument is the basis for the rule. Many items which are in common use are capable of inflicting injury. However, if the peculiar capacity for injury or hurt of the item is not obvious

and notorious, a plaintiff seeking relief against the defendant responsible for the proper manufacture, installation, maintenance or repair of such an instrument causing the injury is not properly faced with a directed verdict against him upon the common use rule. Certainly, a more apt name for the rule would be "obvious danger rule," since the rule is applied only where the instrumentality involved is obviously capable of inflicting injury, yet is never applied to an instrument which, although in common use, does not have the obvious capacity for hurt and injury.

Petitioner submits that the holes in the defendant's manhole cover did not constitute an obvious danger, notorious for their capacity to injure the plaintiff. Certainly, that cannot be compared to a red-hot stove, an uncovered steam radiator pipe or an open can of gasoline in close proximity to fire or a spark.

McNeal v. *City of Louisville*, 287 Ky. 83, 151 S. W. 2d 749, is not applicable. In this case, the plaintiff proved only that she caught her heel in a catch basin in a crosswalk and that she was caused to fall. Plaintiff admitted in her testimony that there was nothing wrong with the construction, maintenance or repair of this catch basin. There was no evidence introduced by the plaintiff tending to show that persons other than the defendant, who maintained catch basins, took precautions to guard against the injury similar to that experienced by the plaintiff. Because of the plaintiff's complete lack of showing any negligence, the trial Court directed a verdict for the defendant, and this action was affirmed by the Kentucky Court of Ap-

peals. Certainly, it takes no ingenuity to see the difference between this and the case before this Court at the present time. In our case, plaintiff proved that other businesses and organizations in Louisville maintained manhole covers. Plaintiff further proved that it was the practice of these people to provide a cover for the holes which are found in the top of manhole covers, especailly when located in crosswalks. Thus, there was evidence to show that responsible concerns in Louisville, Kentucky, found it reasonably prudent to take the precaution of plugging these holes. It was further shown that defendant did not take such precautions. Thus, clearly, Mrs. Sparks met the burden of proving that the manhole cover was improperly constructed and maintained, resulting in a condition which Western Union permitted to exist, which was dangerous to travelers upon the highway. Of course, a catch basin is essentially different in that it is designed for the purpose of receiving water from the street in order to place it in the sewer. Its holes are large enough to attract attention. However, in the present case the manhole cover is solid, except for the four small holes. Other companies in Louisville have anticipated the danger that caused this accident and have taken steps to remedy it. Thus, the case is not applicable. Therefore, here more was shown that merely the plaintiff's heel becoming caught in the grating, but the plaintiff met the burden of showing that reasonable, prudent utility operators in the city of Louisville had anticipated this matter and had taken steps to correct it.

City of Louisville v. *Moore*, 267 Ky. 536, 102 S. W. 2d 989, has no application to the present case, because there was no showing at all that the particular catch basin involved was unsafe or that its warped condition caused the plaintiff to fall. The City Engineer testified concerning the number of catch basins in existence and that there were a number of the old type still being used that were installed in 1918. He further said the design was abandoned, but that there were new specifications calling for a catch basin frame and grating of different construction. The space between the grating bars on the new construction was one and one-half inches, while the grating between the bars on the catch basin involved was one and one-eights inches. Moreover, the City Engineer testified that the grating was all right, even though it was warped. However, it is to be noted in the Moore case that there was no contradiction in the case whatsoever concerning the method of properly maintaining the catch basin. Again, the distinction is that here there is a conflict in showing that manhole covers can be maintained in a safer condition by the use of rivets, and is so maintained by the largest single proprietor of manhole covers in Louisville. In *City of Louisville* v. *Moore*, *supra*, the plaintiff relied upon the *res ipsa* doctrine, which the plaintiff did not do in the present case. Again, the plaintiff introduced evidence to show that reasonable men in the operation of their utility in the city of Louisville have anticipated this danger. The evidence clearly shows that the Louisville Gas & Electric Company and the Sewer Commission anticipated the dan-

ger of someone being injured by catching a shoe in one of these holes, and either installed a solid manhole cover in the crosswalk, or in the exercise of reasonable diligence provided a guard by way of the rivets in the holes against such danger. Certainly, it cannot be said, as a matter of law that this preventative action by this reputable company was not what a reasonable man would do. Therefore, the question of what is reasonable procedure is properly for the jury. This question was properly submitted to the jury at the trial, and the jury concluded that the reasonable, prudent thing to do with respect to these holes was to cover them so that persons who walked on them, exercising due care, would not be subject to injury.

The quotation on page 10 of the Petition from *Ellis* v. *Louisville & Nashville Railroad Company*, 251 S. W. 2d 577, 579 (Ky.), which is an edited excerpt from *38 Am. Jur.*, "Negligence," Section 34, pages 679-682, is not applicable here when the whole section is read, for it clearly shows that the Court of Appeals had before it at that time only the question of undisputed evidence of custom establishing a method by which an ordinary, prudent person operated its business. The key to the whole section is in the following language:

> "The conclusion to be reached upon undisputed evidence which shows that the defendant acted in accordance with the uniform custom of persons engaged in like business, in the absence of any evidence showing that such custom is negligent should be that the defendant did not act negligently."

However, here it was clearly shown that there is no uniform custom concerning holes in manholes covers and, therefore, the question was clearly one for the jury.

McQuillan v. City of New Orleans, 18 So. 2d 218 (La.), is not applicable to the present problem because of the nature of the judicial system of the State of Louisiana. Louisiana is different from all the other forty-seven States of the Union, in that by its *Constitution, Article 7*, Sections 10, 29, all appeals are upon law and fact, and, hence, a jury's findings are not binding on the Appellate Court, *III Martindale-Hubbell, "Louisiana Law Digest," "Appeal and Error," "Scope of Review."* Thus, the Appellate Court's conclusion that the sidewalk was reasonably safe for a pedestrian who was reasonably shod does not touch the problem of a submittable jury issue. However, the Court did not hold that there was nothing to submit to the Court as a matter of law on the pleadings, and it is to be noted at page 219, under the Louisiana practice, the city's exception of no right or cause of action was overruled, and the matter was tried out after the city had answered before the Court. Again, it should be also noted that there was no evidence introduced of a different method of construction of the grating to meet the purpose for which the holes were installed. In the present case this has been done, and, therefore, the case is not applicable. It is simply the conclusion of a judge acting as a jury in his findings of fact in a matter not heard by him. However, the case is of authority to the effect that there is a question of fact

to be decided by the Court, because the allegations in the complaint were held sufficient to state a cause of action. It is also to be noted that the abutting property owner compromised the claim, and the case continued against the City of New Orleans alone. Thus, from the factual situation and the procedure involved it is not authority one way or another concerning the question of whether or not this case should have been submitted to the jury. Compare *Holbrook* v. *City of Monroe*, 157 So. 566 (La.), holding to the contrary.

Haar v. *Vogelman Bakery Company*, 312 Ky. 307, 227 S. W. 2d 423, is not in point as it involves the question of attractive nuisance. However, the case involved gasoline in a can which spilled while on fire injurying the plaintiff. As stated by the Trial Court (R. 15a, 16a) for the common use doctrine to apply, it must be shown that the article involved is generally known to the public to be dangerous. There is certainly a vast difference between an explosive fluid such as gasoline and a manhole cover. The gasoline will burn whenever it comes in touch with fire, but stepping on a manhole cover is not necessarily dangerous for all covers do not have holes in them. The latter part of the quotation has no applicability because others have manhole covers, and when they are in places where people walk, they are able to protect the pedestrian and the public. The custom in Louisville has been set by the largest maintainer of manholes. There is no proof that a solid cover, or rivets could not be placed in the holes in this cover. There are other manholes of Western Union in this intersection that

could well have taken care of the ventilation. Thus, there is no reason for Western Union to be "chargeable with habitual or continuous negligence" except by its own choosing. Others have been doing the same job in a safer manner for fifteen years (R. 178a- 185a; 63a-81a). Certainly, this is a showing of an anticipation of danger and the exercise of reasonable diligence by others in the field, and submitted an issue of fact for the jury as to whether or not reasonable, prudent men would differ as to the exercise of reasonable care in the maintenance of its manhole covers by Western Union.

The Sixth Circuit has had recent occasion to deal with the defense of custom. In *Northwest Airlines* v. *Glenn L. Martin Company*, 224 F. 2d 120, 129 (C. A. 6th), it held as to the question of whether custom established a defense as a matter of law, that it did not, and that customary practice is not ordinary care, but it is evidence of ordinary care to be properly considered by the jury. The same rule is applicable in Kentucky, for it was held that evidence that the defendant has not adopted methods or precautions to prevent injury that have been adopted by other persons is admissible on the question of negligence and makes a jury question. *McKibben* v. *Bakers*, 1 B. Mon. 120, 40 Ky. 120, 122 (1840). See also *Clark's Adm'r.* v. *Kentucky Utilities Company*, 289 Ky. 225, 158 S. W. 2d 134; *Louisville Home Telephone Company* v. *Gasper*, 123 Ky. 128, 93 S. W. 1057; *C. D. Herme, Inc.* v. *R. C. Tway Co.*, 294 S. W. 2d 534, 537 (Ky.).

From the foregoing, it is apparent that there is a jury question because from the evidence it is perfectly apparent that reasonable men might differ as to the duty of ordinary care in this situation. *City of Louisville* v. *Haugh*, 157 Ky. 643, 163 S. W. 1101. The Trial Court in its memorandum clearly pointed out the distinguishing features of the cases relied upon by the Petitioner as applied to the present case. Approximately one-fifth of the manhole covers in the City of Louisville are protected for the purpose of avoiding this type of accident. The Trial Court (R. 17a) correctly applied the rule in this situation of *Texas & P. R. Company* v. *Beykmer*, 189 U. S. 468, to the effect that what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. The Trial Court correctly applied the rule of the Sixth Circuit as stated in *Empire Oil & Refining Company* v. *Hoyt*, 112 F. 2d 356, 361, that the proof of custom in view of the conflicting evidence was insufficient to sustain Western Union's claim of immunity and the matter was properly a question for the jury.

Reference has been made in the Petition (page 11) to the necessity for having holes in the manhole covers for the purpose of ventilation in order to avoid explosions from gas collecting in the vault. There is a strict conflict in the evidence as to whether it was necessary for this particular manhole cover located in a crosswalk to have holes in it. Many utilities do not have holes in the covers (R. 193a). Western Union's Engi-

neer admitted holes are optional (R. 193a) and that it was not necessary always for ventilation purposes, and a solid manhole may be used where there are other means of taking care of the ventilation (R. 198a). Here, from Plaintiff's Exhibit 3, R. 25a and Defendant Exhibit 1, R. 51a, it is perfectly apparent that outside of the crosswalk Western Union had other manholes which could well have furnished such ventilation.

In addition, plaintiff's and defendant's proof showed that the gas that was heavier than air would remain in the manhole, regardless of the number of holes that the cover possessed (R. 71a, 179a, 206a). The covers are not placed in tightly and there is room around the edge of the manhole for the gas that is lighter than air to escape (R. 179a). It was further shown that for the purpose of workmen going into the holes the standard practice is for them to test, and if there is gas in the hole, to take it out by means of fans (R. 66a, 179a). In addition, the rivets are not placed tightly in the manhole covers and there is room for the gas to go around them in the case of the Louisville Gas & Electric Company. It was further shown by the City Engineer (R. 124a) that at no time had he ever made any complaint to the Louisville Gas & Electric Company that it had stopped up the holes on its manhole covers because he thought there was a danger of a gas explosion resulting from the practice. Thus, it is clear that there is a conflict of evidence and a jury question as to whether these holes were necessary as to this particular manhole cover in this particular

crosswalk for the purpose of preventing an explosion. The jury having returned a verdict after hearing proof in favor of the plaintiff has considered these issues, and this Court should not overrule it as reasonable men might differ upon the necessity for these holes upon the proof presented.

B. Should the District Court have directed a verdict for Western Union Telegraph Company upon the ground that Mrs. Sparks' injury was caused by her own contributory negligence when she was crossing for the first time in two months a busy intersection in the crosswalk and watching for vehicular traffic that may turn in her path and inadvertently steps upon a manhole capped by a cover containing holes which caught her heel?

A fair reading of the evidence of Mrs. Sparks (R. 25a-36a, 45a-53a) in this case will convince the Court that she was not guilty of contributory negligence or assumed risk. The plaintiff was crossing Market Street at the intersection of Fourth and Market on the east side of Fourth Street in a designated crosswalk. The traffic light had turned green for her, and there were automobiles moving north and south on Fourth Street (R. 28a). The northbound traffic may make a right turn into Market off Fourth Street across the crosswalk in which she was walking (R. 28a). The automobiles on Market Street had stopped in obedience to the light (R. 28a). As she walked across the street it was necessary, and she did, watch and observe the traffic that was approaching or ready to start

across or through or around the intersection (R. 28a). While she was so walking her heel caught in one of the holes in the cap, and threw her down (R. 29a). She had not seen the hole before that time (R. 29a). She had not been across this intersection since the week before Christmas in 1953 until the date of injury, March 8, 1954—a period of better than two months (R. 47a). The holes in the cover were not visible to her (R. 48a) as she was not looking for them and not looking down at the walk as she crossed (R. 47a). She had not observed the holes in the covers previously (R. 47a) although admittedly while employed at Bacon's she had crossed this intersection many times (R. 46a) and had generally seen the circular manhole cover (R. 47a) while passing. She had also occasionally seen manhole covers with holes in them (R. 50a) in other parts of the City.

It is hard to see any basis for contributory negligence on the part of Mrs. Sparks when she had not been across this intersection for two months and had no knowledge of any defect in the walk. While Mrs. Sparks was crossing in the crosswalk, the rule in Kentucky is that, as to defects in the street, a pedestrian may cross the street at any point without imputation of negligence. *City of Louisville* v. *Haugh*, 157 Ky. 643, 163 S. W. 1101, 1102. All parts of the street are to be kept in safe condition for pedestrians. *City of Glasgow* v. *Gillenwaters*, 113 Ky. 140, 67 S. W. 381. There is only one degree of care required of those using the public thoroughfare, and that is ordinary care. *City of Louisville* v. *Haugh, supra*, page 1102.

One using the public street is not required to anticipate danger, but may proceed upon the assumption that the walk way is in a reasonably safe condition. *City of Louisville* v. *Verst,* 308 Ky. 46, 213 S. W. 2d 517, 520. This is true although the person has passed the defect many times it is still a jury question as to whether he had knowledge of the defect. *City of Lebanon* v. *Graves,* 178 Ky. 749, 199 S. W. 1064, 1067. It is a well established general rule that persons using a public way which is in constant use, when their attention has not been called to any obstructions or perils thereon, have a right to assume, and to act on the assumption, that the way is safe for ordinary travel. 25 *Am. Jur.,* "Highways", Section 461, page 749. *Merchants' Ice & Cold Storage Company* v. *Bargholt,* 129 Ky. 60, 110 S. W. 364.

The same rule is true in crossing streets. *City of Ashland* v. *Boggs,* 161 Ky. 728, 171 S. W. 461, 464; *Flynn* v. *Town of Waltertown,* 173 Mass. 108, 53 N. E. 147; *Dale* v. *City of Syracuse,* 24 N. Y. Supp. 968, affirmed 148 N. Y. 750, 43 N. E. 986. On the above authorities it is impossible to say that one crossing the street must keep his attention fixed on the ground. The greatest danger is that of being run over by a passing vehicle. Nor is it required that a critical examination be made of the covering of a manhole before stepping on it. *McLaughlin* v. *Kelly,* 230 Pa. 251, 79 A. 552, 555; *Dickson* v. *Hallister,* 123 Pa. 421, 16 A. 484, 487. As the Trial Court found, the presence of a manhole cover is not necessarily a danger signal for the pedestiran for there are manhole covers without

holes in them or with one hole in them (R. 16a). *City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386, 387. Moreover, when one's attention is diverted from the street at the time of encountering the defect by some cause adequate to effect the result, it is an issue for the jury as to the contributory negligence of the pedestrian. *City of Ashland* v. *Boggs,* 161 Ky. 728, 171 S. W. 461, 463; *Merchants' Ice & Cold Storage Company* v. *Bargholt,* 129 Ky. 60, 110 S. W. 364. Watching heavy traffic at an intersection and the performance of a legal duty to maintain a lookout for cars was such an excuse for not seeing the hole as to clearly make a jury issue. *City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386, 387; 25 *Am. Jur.,* "Highway", Section 468, page 760.

The governing cases here making the question of contributory negligence of Mrs. Sparks a jury question are *City of Louisville* v. *Wheeler, supra,* as to divergence of attention from defect, and *City of Louisville* v. *Verst, supra,* as to knowledge of defect from passing the spot many times when the defect was in the nature of a trap. See also *City of Lebanon* v. *Graves,* 178 Ky. 749, 199 S. W. 1064, 1067.

As to contributory negligence the case of *Crain* v. *City of Louisville,* 259 S. W. 2d 52, does not overrule the Verst case as Petitioner contends. The defect in the sidewalk which injured Mrs. Verst was a hole in the nature of a "trap". In the Crain case the defect contained none of these elements of a "trap" as it was obvious, and the plaintiff was fully aware of its existence as she lived six or seven years two doors from the

defective place which had been there all the time. Furthermore, since the plaintiff admitted that she was paying no attention to her footing, the Court of Appeals held, as a matter of law, that she was contributorily negligent. But in the present case attention cannot be fixed upon the crosswalk because in crossing the street the pedestrian must be on the lookout for automobiles for that is the source from which danger usually comes. *City of Ashland* v. *Boggs,* 161 Ky. 728, 171 S. W. 461, 464. The Crain case has no application to this case because it was not proved that the plaintiff, Mrs. Sparks, had actual knowledge of the dangerous characteristics of defendants' manhole cover, nor was it shown she was not exercising due care for her safety. The holes in the manhole cover were not obvious and notorious, and, therefore, cannot be placed in the same category as the rough and uneven sidewalk. *City of Lebanon* v. *Graves, supra.*

Looking at the Crain case further, it is interesting to note that the Court mentioned the dissent of Judge Stites in *Monroe* v. *City of Louisville,* 278 Ky. 648, 129 S. W. 2d 119. In that case Judge Stites was of the opinion that a person walking along a smooth sidewalk was not required to exercise as high a degree of care as a person walking on an uneven and rough sidewalk. Thus, it seems that the Court indicated that in cases where the sidewalk was obviously defective, and plaintiff admitted paying little or no attention to where she was walking (these facts represent plaintiff's conduct in Crain case), then it would be proper for the lower Court to direct a verdict. The Court did not say, as

Western Union would have us believe, that merely because a defect which was not obvious had existed for some time in the sidewalk that the question was not one for the jury as to defendant's negligence and plaintiff's contributory negligence. *Louisville & Nashville Railroad Company* v. *Mulverhill,* 147 Ky. 360, 144 S. W. 83, 85-86.

As to the Crain case it should be noted that Judge Cammack spoke for the Court of Appeals of Kentucky, and he also spoke for the Court in *City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386. However, Judge Cammack did not mention by name or otherwise indicate that the Wheeler case was overruled.

As to *Interstate Coal Company* v. *Deaton,* 148 Ky. 160, 146 S. W. 396, it is sufficient to say there is a big difference between small holes that operate as a trap and a beam in a barn as to an obvious and known defect of which a person assumes the risk. Certainly, the defect in the present case is not so obvious as to justify an assumption of risk defeating the plaintiff's recovery. *City of Lebanon* v. *Graves, supra,* page 1067. The question of whether or not it was so obvious is certainly a jury question in accordance with the above cited authority. Although *Interstate Coal Company* v. *Deaton, supra,* was approved as stating the correct principle of the law in *Cardwell* v. *Haycraft,* 268 S. W. 2d 916, 918 (Ky.), this case clearly illustrates that a jury question is presented. In the Cardwell case the issue was submitted to the jury concerning proximate cause and a new instruction was

ordered, even though it was conceded that there was a possible assumption of risk. However, this case is clearly not applicable to the present situation for in the Cardwell case the plaintiff was an expert mechanic working on a truck and he knew all about the danger before the truck fell upon his arm. This is an entirely different situation from a lady crossing a street.

From the foregoing it is clear the Trial Court and the Court of Appeals correctly ruled that the question of contributory negligence of the plaintiff should be submitted to the jury, and was not a defense as a matter of law.

THIRD.

The decision is not unique or unprecedented and does not jeopardize the future use of safety vents in manhole covers.

It is true there is a conflict of evidence in this case as to the use of the rivets in the holes by the Louisville Gas & Electric Company. However, the evidence of Western Union itself shows that where necessary to protect equipment they use solid manhole covers where the situation is as here in that other manholes not in the crosswalk provide ventilation. No evidence was presented that in the City of Louisville there has ever been an explosion in a manhole of the Louisville Gas & Electric Company because there rivets are placed therein. The rivets are not air tight and there is room for adequate ventilation around the side of the cover and around the rivets. As far as anyone seeking to recover because of holes in gratings where pedestrians

walk the books are full of such cases. *Mooney* v. *Hauck*, 1 Ohio App. 435, 35 Ohio C. C. 134, 18 Ohio C. C. N. S. 116, affirmed 112 N. E. 1084 (62 A.L.R. 1086); *Nichaus* v. *Caryfield*, 269 N. Y. S. 335; *Monsch* v. *Pellissier*, 187 Cal. 790, 204 P. 224; *Sanders* v. *First National Bank*, 183 Okl. 112, 80 P. 2d 207; *Holbrook* v. *City of Monroe*, 157 So. 566 (La.); *Upham* v. *City of Boston*, 187 Mass. 220, 72 N. E. 946. The sole question in this case concerns manhole covers in crosswalks where great numbers of people walk. It doesn't concern manhole covers in other portions of the street. We have a downtown intersection, and the question of whether or not these covers may be placed as traps in intersections is the only issue involved. Other responsible public utilities have seen fit either to place rivets in the holes when the cover is in the crosswalk or not to place their manhole in a crosswalk. Thus, the issue here simply involves a question of reasonable care by utilities in not making the crosswalks of a city subject to a trap as far as female pedestrians are concerned. The statements made on page 13 of the Petition are not accurate. Western Union's own expert does not substantiate them, and Western Union itself does not always use manhole covers with holes when other ventilation is available from other manholes as there was here. Thus, the case does not have the effect that the Petitioner claims. It merely requires the Petitioner to exercise in crosswalks the standard of care as to pedestrians that it would apply to the protection of its own equipment in the manhole if water leaked into it, or to utilize the same care that

responsible utilities in the City of Louisville have been exercising for fifteen years. This utility with only 150 manholes in the City of Louisville can certainly exercise the same degree of care as to covers located in crosswalks that the Louisville Gas & Electric Company exercises with better than 1,000 manhole covers in the City without complaint from the City Engineer or an explosion. A better way has been shown without the danger of any explosion. This better way has been in use for fifteen years. Certainly, evidence of better ways of performing its function in maintaining the appliance may be considered as evidence of negligence. *Louisville Home Telephone Company* v. *Gasper,* 123 Ky. 128, 93 S. W. 1057, 1058.

FOURTH—CONCLUSION.

It is respectfully submitted for the foregoing reasons that the Petition of Western Union for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

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CERTIFICATE OF SERVICE.

I, John P. Sandidge, Counsel for Mary Ruth Sparks, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 5, 1957, I served a copy of the foregoing Response to the Petition for Writ of Certiorari on the Petitioner, Western Union Telegraph Company, by that day depositing a copy thereof in a United States Post Office in a duly addressed envelope, with first class postage thereon prepaid, addressed to its counsel of record, William Marshall Bullitt, at 1700 Kentucky Home Life Building, Louisville 2, Kentucky.

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